

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

JOHN DOE #1, an individual, JOHN
DOE #2, an individual, and PROTECT
MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as
Secretary of State of Washington,
BRENDA GALARZA, in her official
capacity as Public Records Officer for the
Secretary of State of Washington,

Defendants.

NO. 09-cv-05456-BHS

DEFENDANTS' MOTION AND
MEMORANDUM TO JOIN
ADDITIONAL PARTIES

NOTE ON MOTION
CALENDAR:

AUGUST 21, 2009

MOTION

Pursuant to CR 19(a), Defendants Reed and Galarza move for an Order requiring the
Plaintiffs herein to join in this action the following parties:

1. Brian Murphy, WhoSigned.org;
2. Toby Nixon, President, Washington Coalition for Open Government;
3. Arthur West.

This Motion is based on the memorandum below and on the attached exhibits.

MEMORANDUM

I. BACKGROUND

The State of Washington has an open government law that generally requires state and local agencies to make available, for public inspection and copying, all public records. Wash. Rev. Code § 42.56.070.¹ Pursuant to the Washington State Constitution, article II, section 1(d), a group of citizens recently filed petitions with the Washington Secretary of State (Defendant Reed) seeking to place a referendum on the November 2009 ballot to consider a bill enacted by the 2009 session of the legislature. SB 5688 (2009 Wash. Sess. Laws, page nos. 3065-3141). The proposed referendum has been denominated Referendum Measure No. 71 (RM-71). Pursuant to state statute, the Secretary of State is currently engaged in verifying and counting the signatures on the petitions to determine if a sufficient number have been submitted to satisfy the constitutional requirements for placing RM-71 on the November 2009 ballot. The petitions in support of RM-71, each containing up to 20 signatures, together with accompanying information about the signers, were filed on July 25, 2009, and are in the custody of Defendant Secretary of State.

On July 29, 2009, the Plaintiffs filed the present action, and seek to enjoin Defendant Secretary of State from any public release of documents showing the names of those signing petitions in support of RM-71. Plaintiffs do not assert that this information is exempt from disclosure under state law, and rather assert that public release of the information would impair

¹ Certain categories of public records are exempt from public disclosure. *See, e.g.*, Wash. Rev. Code §§ 42.56.210 through .480. None of the statutory exemptions appear to apply to the records at issue in this case.

1 rights assertedly guaranteed by the Constitution of the United States. Compl., ¶¶ 1-6 and Prayer
2 for Relief.

3 The Defendant Secretary of State has received three requests for public disclosure of the
4 records which are the subject of this action:

- 5
6 • On July 28, 2009, the Secretary of State received a request for the “Referendum 71
7 petition materials” from Brian Murphy of WhoSigned.org. A copy of the e-mail
8 request is Exhibit A to this Motion. It is clear from the context of the message that
9 Mr. Murphy is seeking the names of those signing the RM-71 petitions, in addition
10 to certain other information.
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12 • On July 31, 2009, the Secretary of State received a request for “copies of all signed
13 petition pages for Referendum 71” from Toby Nixon, President, Washington
14 Coalition for Open Government. A copy of this e-mail request is Exhibit B to this
15 Motion.
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17 • On August 4, 2009, the Secretary of State received a request for “inspection and
18 copying of the records maintained by the Secretary of State in regard to R-71, to
19 include any signed petitions and any records related to the State’s certification of the
20 validity of the signatures” from Arthur West. A copy of this request is Exhibit C to
21 this Motion.
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II. POINTS AND AUTHORITIES

Having filed requests for access to the records which are the subject of this action, Mr. Murphy, Mr. Nixon, and Mr. West are required to be joined in this case if feasible.

The Secretary of State holds custody of public records which (1) are available for public inspection and copying under state law, and (2) are the subject of an action seeking to enjoin their public disclosure; and (3) are the subject of three requests for public access. It appears that Mr. Murphy, Mr. Nixon, and Mr. West, the three requesters, are all subject to service of process, and their joinder would not deprive this court of subject-matter jurisdiction.²

Civil Rule 19 lists alternate conditions in which additional parties should be joined to a case. Civil Rule 19(B) squarely applies here. This part of the rule requires joinder of a person if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

- (i) as a practical matter impair or impede the person's ability to protect the interest; or
- (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Both prongs of this part of the rule apply here. The three requesters assert a right to inspect and to copy the petitions filed in support of RM-71. If the Plaintiffs prevail, the Defendants will be permanently enjoined from complying with public records requests filed by Mr. Murphy, Mr. Nixon, and Mr. West. Unless they are joined, these parties will have no opportunity to assert their own statutory and constitutional interests in obtaining access to the RM-71 petitions and the information contained therein.

² Exhibit A shows a Seattle-area telephone number for Mr. Murphy and his organization. Exhibit B shows a Seattle address and telephone number for Mr. Nixon and his organization. Exhibit C shows an address in Olympia, Washington, for Mr. West.

Furthermore, if the requesters are not joined in this case, they (or others similarly situated) may start separate litigation against the Defendant Secretary of State, asserting that they have a right to access to the RM-71 petitions. In such litigation, not having been parties to this case, they would be free to challenge, and to attempt to relitigate the issues decided in this case. State law requires prompt response by agencies to public records requests. Wash. Rev. Code § 42.56.520. State courts may review the decisions of agencies denying requests to inspect or copy public records, and state statutes assign the burden of proof to the agency denying the request. Wash. Rev. Code § 42.56.550(1). Persons who prevail against an agency are entitled to an award of all their costs, including significant monetary penalties and reasonable attorney fees. Wash. Rev. Code § 42.56.550(4).³ Thus, the Secretary of State could be caught between an order enjoining release of the records in question, and an order granting severe sanctions for failing to release the same records.

The federal courts have had many occasions to apply CR 19 in requiring joinder of additional parties, and have stated that the purpose of Rule 19 is to “permit joinder of all materially interested parties to a single lawsuit so as to protect interested parties and avoid waste of judicial resources.” *Askew v. Sheriff of Cook Cy.*, 568 F.3d 632, 634 (7th Cir. 2009), quoting from *Moore v. Ashland Oil, Inc.*, 901 F.2d 1445, 1447 (7th Cir. 1990).⁴ In a case involving

³ The state courts have been strict in assessing penalties and attorney fees against public agencies who improperly withhold public records from disclosure. *See, e.g., Soter v. Cowles Publ’g Co.*, 162 Wash. 2d 716, 174 P.3d 60 (2007), and *West v. Thurston County*, 144 Wash. App. 573, 183 P.3d 346 (2008).

⁴ The *Askew* case illustrates that where it is feasible to join additional parties with an interest in the action, joinder of the additional parties is preferable to proceeding without them and preferable to dismissing the case altogether for failure to join.

1 FOIA, the federal public disclosure act, a circuit court dealt with a case in which television
2 manufacturers had sought to suppress public disclosure of television accident data maintained
3 by a federal agency, and did not join several parties who had filed FOIA requests for the data.
4 Although under the circumstances of the case, the Court of Appeals did not dismiss the case for
5 failure to join the requesters, the Court observed that "their joinder would have been desirable."
6 *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n*, 598 F.2d 790 (3rd Cir. 1979). The *GTE*
7 *Sylvania* case illustrates the pitfalls of failing to join all interested parties in one case. In the
8 *GTE Sylvania* case, the manufacturers litigated in the federal court in Delaware, while the
9 requesters started a separate action in federal court in the District of Columbia. The two
10 courts reached inconsistent results, which could be sorted out only with a decision of the U.S.
11 Supreme Court. *GTE Sylvania, Inc., v. Consumers Union of the United States, Inc.*, 445 U.S.
12 375, 100 S. Ct. 1194, 63 L. Ed. 2d. 467 (1980).
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15 III. CONCLUSION

16 If all interested parties are not joined, the Defendants face the real possibility of
17 additional litigation with possible inconsistent results. Furthermore, while the Secretary of State
18 is willing to defend the constitutionality of Washington State statutes and the State policy in
19 favor of public disclosure of public records, only the requesters of the records can assert their
20 individualized reasons for seeking access to the petitions for RM-71. Accordingly, this Court
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1 should require that Plaintiffs join Brian Murphy, Toby Nixon, and Arthur West as additional
2 Defendants in this matter.

3 DATED this 6th day of August, 2009.

4
5 ROBERT M. MCKENNA
6 Attorney General

7
8 s/ James K. Pharris
9 James K. Pharris, WSBA #5313
10 Deputy Solicitor General
11 PO Box 40100
12 Olympia, WA 98504-0100
13 360-664-3027
14 jamesp@atg.wa.gov
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2009, I electronically filed a Motion to Join Additional Parties and Proposed Order in the above-referenced case and Certificate of Service with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

Stephen Pidgeon, attorney@stephenpidgeon.com
James Jr Bopp, jboppjr@aol.com
Scott F. Bieniek, sbieniek@bopplaw.com
Sarah E. Troupis, stroupis@bopplaw.com

DATED this 6th day of August, 2009.

s/James K. Pharris
James K. Pharris

EXHIBIT A

Pharris, James (ATG)

From: Galarza, Brenda [bgalarza@secstate.wa.gov]
Sent: Tuesday, August 04, 2009 12:21 PM
To: Pharris, James (ATG)
Subject: FW: Public Records Request for Referendum 71 petition records

From: Brian Murphy [mailto:brian.murphy.wa.usa@gmail.com]
Sent: Tuesday, July 28, 2009 11:55 AM
To: Galarza, Brenda
Cc: Brian Murphy
Subject: Public Records Request for Referendum 71 petition records

Dear Ms. Galarza,

Please consider this an official public records request for the Referendum 71 petition materials from WhoSigned.org. We request that you provide the records in digital format on DVD storage media. We would like to collect the records at the earliest possible moment that they are made available so please keep me informed of the expected production and completion of the DVDs so an immediate pick-up can be scheduled.

Additionally, we request timely disclosure of any other individuals or organizations making any public record requests for Referendum 71 related information. We also request that once the signature verification process is complete the records of the observers names, organizations and times and dates of attendance through the whole verification process be disclosed to us.

I would appreciate an acknowledgement of this request and hope you'll feel free to call me at any time with any questions you might have.

Many thanks,

Brian Murphy
WhoSigned.org
(206) 313-1175

EXHIBIT B

Pharris, James (ATG)

From: Galarza, Brenda [bgalarza@secstate.wa.gov]
Sent: Tuesday, August 04, 2009 12:20 PM
To: Pharris, James (ATG)
Subject: FW: Public Records Request for Referendum 71 Petitions

Importance: High

From: Toby Nixon [mailto:president@washingtoncog.org]
Sent: Friday, July 31, 2009 11:53 AM
To: Galarza, Brenda
Cc: Reed, Sam (Web); Handy, Nick; Blinn, Katie
Subject: Public Records Request for Referendum 71 Petitions
Importance: High

July 31, 2009

Brenda Galarza, Public Records Officer
Office of the Secretary of State
PO Box 40237
Olympia, WA 98504

Dear Brenda:

The Washington Coalition for Open Government hereby requests, under the provisions of the Washington State Public Records Act RCW 42.56, copies of all signed petition pages for Referendum 71. We would like to receive these copies as scanned images on CDROM. Please let me know at your earliest convenience the cost of producing these CDs and mailing them to us, and I will arrange for a check to be sent to you right away.

Best regards,

Toby Nixon, President
Washington Coalition for Open Government
6351 Seaview Ave NW
Seattle, WA 98107-2664
(206) 782-0393
president@washingtoncog.org

EXHIBIT C

RECEIVED
AUG 04 2009
Office of Secretary of State

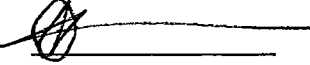
August 4, 2009

TO: WASHINGTON STATE SECRETARY OF STATE
RE: PUBLIC RECORDS REQUEST FOR R-71 RECORDS
FROM: Arthur West,
120 State Ave NE #1497
Olympia, Washington, 98501

RECEIVED
09 AUG -4 P 3:34
CENTRAL OFFICE
ATTORNEY GENERAL
STATE OF WASHINGTON

Please regard this as a request pursuant to RCW 42.56, for inspection and copying of the records maintained by the Secretary of State in regard to R-71, to include any signed petitions and any records related to the State's certification of the validity of the signatures. I do not intend to employ the records for commercial purposes. If there is any proceeding pending regarding this matter, please regard this as a request for inspection and copying of the pleadings pertaining to such proceeding, as maintained by the Secretary of State.

Thank you.


Arthur West